Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals	)	CS Docket No. 98-201
to Unserved Households for Purposes	)	RM No. 9335
of the Satellite Home Viewer Act	)	RM No. 9345
	)	
Part 73 Definition and Measurement of	)	
Signals of Grade B Intensity	)	

COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

National Broadcasting Company, Inc. ("NBC"), files these comments in response to the Notice of Proposed Rulemaking ("Notice"), FCC 98-302, released November 17, 1998, in the above-captioned proceeding.[1] NBC believes it is essential at the outset to acknowledge the following undisputed facts:

- This rulemaking proceeding relates to the interpretation of terms contained in the Satellite Home Viewer Act ("SHVA"), which is part of the Copyright Act – not the Communications Act.

- Congress enacted the SHVA as a means of enabling satellite carriers to provide broadcast network service to those *limited* number of consumers who cannot receive the over-the-air signal of local network stations. At the same time, Congress recognized the need to preserve the network-affiliate distribution system. Accordingly, the carriers are allowed to provide network service only to a very narrowly defined group. Basically, a satellite carrier can only provide such service where the local broadcast station cannot do so.

- The satellite carriers have been found to have willfully ignored this limitation and have engaged in gross violations of the law, undermining the exclusive rights of local broadcast stations and injuring consumers in the process.

[1] NBC also fully supports the comments filed in this proceeding by the National Association of Broadcasters.

Now that these programming pirates have been caught and are being forced by the courts to comply with the law, they are seeking the assistance of the FCC to modify the law under the banner of "promoting competition." The FCC should not allow itself to be manipulated by these law violators. The SHVA was carefully designed by Congress to provide network service *only* to those limited number of viewers who are not able to receive such programming from their local television stations. Congress *did not* enact the SHVA as a means of creating a competitor to cable who is allowed to distort the local television marketplace through the importation of distant network signals. The FCC clearly lacks jurisdiction to alter this statutory scheme.

Not only does the agency lack the authority to change the Grade B standard for "unserved households" for purposes of the SHVA, but there is simply no need for any change to be made. The Grade B intensity standard is recognized as an appropriate and reliable means of determining picture quality and consequently, a local station's service area. Indeed, as the Commission itself acknowledges, the majority of satellite subscribers who are threatened with the loss of network service are not qualified to receive such service because they do not live in "unserved households under any interpretation of that term."[2] These viewers will not be disenfranchised from network programming – they will simply be viewing local network stations via an antenna, if necessary. This result is precisely what is intended by the SHVA.

In addition, the broadcast industry, along with certain satellite television providers, have found a practical solution to preventing – as well as resolving – disputes relating to

[2] NPRM at ¶15.

which viewers qualify as "unserved" under the current SHVA Grade B standard. In the Settlement Agreement between the broadcasters and Primestar and Netlink, the parties designed a system which classifies households into areas which are clearly "served" (referred to as "red light"zones) and those which are "unserved" ("green light" zones). For those areas where the level of service may be uncertain, the Settlement Agreement includes a mechanism for resolving disputes.[3] This agreement demonstrates that private parties working in good faith can implement the SHVA as Congress intended without requiring governmental intervention.

Further indication that the FCC need not be concerned with modifying the Grade B standard in the SHVA to "promote competition" can be found in today's marketplace where certain satellite service providers have found a way to compete with cable -- without undermining the purposes of the SHVA -- by offering subscribers the ability to receive local television stations. Take the example of DirectTV, the largest DBS provider, who is marketing a service with Bell Atlantic to provide an over-the-air antenna along with the DBS dish, enabling subscribers to also get their local broadcast signals. According to a recent article in the Wall Street Journal, "Now, DBS services, working with telephone companies, are simply adding a separate advanced antenna to their satellite package. They give customers the local channels they want – but not by satellite."[4] The companies' initial efforts have been so successful that the service is being launched in an

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[3] As the FCC notes, the Settlement Agreement is part of the public record in this proceeding. See NPRM at ¶24, note 53.

[4] Wall Street Journal, "Antenna Attract Viewers to Satellite TV", Wall Street Journal, Dec. 1, 1998.

even larger territory.

NBC believes that the most desirable long-term solution to encouraging competition between the cable and satellite industry is for Congress to modify the current copyright law to permit the retransmission via satellite of local stations into local markets. Along with other members of the industry, we have been working with Congress to adopt this legislative solution. We urge the FCC to support adoption of an appropriate local-to-local regime.

I. The Satellite Home Viewer Act Is a Carefully Crafted Copyright Law Designed to Protect the Network-Affiliate Relationship While Providing Network Service to a Small Number of Unserved Viewers

The purpose of the SHVA is not subject to dispute. As recognized by the Commission:

> In the Satellite Home Viewer Act, Congress granted a limited exception to the exclusive programming copyrights enjoyed by television networks and their affiliates because it recognized that some households are unable to receive network station signals over the air. The exception is a *narrow compulsory copyright license* that direct-to-home (DTH) satellite video providers may use for retransmitting signals of a defined class of television network stations "to persons who reside in unserved households."[5]

Because a compulsory copyright license is a governmentally-imposed limitation on the exclusive rights normally accorded to copyright owners, the courts and the Copyright Office (the expert agency in interpreting, enforcing and applying copyright law), have long recognized that such licenses "must be construed narrowly." [6] In the case of the SHVA,

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[5] NPRM at ¶2(citations omitted)(emphasis supplied).

[6] Cable Compulsory License: Definition of Cable Systems, 56 Fed. Reg. 31,580, 31, 590 (1991); see also Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F. 2d 667,670

Congress specifically limited the scope of the compulsory license because of its desire to protect and promote the network-affiliate relationship. As the Commission explained:

> Congress recognized the importance that the network-affiliate relationship plays in delivering free, over-the-air broadcasts to American families, and because of the value of localism in broadcasting. Localism, a principle underlying the broadcast service since the Radio Act of 1927, serves the public interest by making available to local citizens information of interest to the local community (e.g., local news, information on local weather, and information on community events). Congress was concerned that without copyright protection, the economic viability of local stations, specifically those affiliated with national broadcast networks, might be jeopardized, thus undermining one important source of local information.[7]

The network broadcast stations provide the most attractive and desirable programming of any video outlet. These stations provide a unique combination of national and local offerings and the network and its affiliated stations work closely together to create this unique package. As Congress has recognized:

> [H]istorically and currently the network affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. It also provides a highly effective means whereby special strengths of national and local program service support each other. This method of reconciling the values served by both centralization and decentralization in television broadcast service has served the country well.[8]

An important part of the network-affiliate relationship is the exclusive broadcast rights to network programs that each affiliate receives in its market. Allowing the retransmission of distant network stations into the local marketplace deprives the local

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(5th Cir), cert. denied, 423 U.S. 841 (1975)(compulsory license "must be construed narrowly, lest the exception destroy, rather than prove, the rule.")

[7] NPRM at ¶3 (citations omitted).

[8] H.R. Rep. No. 10-887, pt.2, at 20 (1988).

station of these exclusive broadcast rights and erodes the station's viewership – and consequently its advertising revenues – because its programming is no longer unique and distinctive. When local network stations are forced to compete for viewers not only with the other stations in its market – but with distant network stations as well – the viability of such local stations is greatly threatened. This, in turn, of course, threatens the viability of the over-the-air network distribution system.

The Grade B intensity standard in the SHVA represents Congress' determination to limit governmental interference with the broadcasters' exclusive programming arrangements and the network-affiliate distribution system as much as possible by allowing satellite carriers to act only as a "fill in" service for those limited number of viewers who cannot receive the signals of their local network stations. Any modification to the Grade B intensity standard for purposes of the SHVA alters this narrowly defined and carefully constructed compulsory license and thus rests in the exclusive province of Congress.[9] Absent specific direction from Congress, the Commission has no statutory authority to modify this carefully constructed balance.

II. Modification of the Grade B Standard in the SHVA is Not Necessary to Protect Consumers Nor to Promote Competition

In spite of the limited nature of the compulsory license, the carriers have acted in complete disregard of the SHVA restrictions and have sold the network signals to any

[9] NBC does not question the FCC's authority to modify the Grade B intensity standard as a general matter for purposes of the FCC's own rules. However, if such a change were made, it would be a matter of statutory interpretation – ultimately to be resolved by the courts – as to whether the modified definition of Grade B intensity would apply in the context of the SHVA.

viewer willing to pay for the service. The United States District Court for the Southern District of Florida has determined that the largest satellite carrier, PrimeTime 24 and its distributors such as Echostar have grossly violated the limitations imposed by the Copyright Act. The Court found that "*Plaintiffs' evidence indicates that PrimeTime 24 is broadcasting copyrighted network programming to hundreds of thousands of subscribers who receive a signal of grade B intensity as defined by Congress.*"[10] The Court further found that "*the evidence demonstrates that PrimeTime 24 knew of the governing legal standard, but nevertheless chose to circumvent it.*"[11] A federal district court in North Carolina found that "*no reasonable fact finder could fail to find that PrimeTime 24's actions constitute a pattern or practice of statutory violation.*"[12]

Precluded by the courts from continuing to provide network signals illegally, the satellite carriers now turn to the Commission to enlist the agency's assistance to permit them to continue to ignore the specific restrictions inherent in the SHVA. Indeed, the FCC specifically recognizes that the instant rulemaking proceeding is "[i]n response to the Miami court case."[13] We understand the Commission's desire to "ensure that as many consumers as possible can receive a broadcast network signal consistent with the intent of

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[10] CBS, Inc., et al v. PrimeTime 24, 9 F. Supp. 2d 1333, 1344 (S.D. Fla. 1998) (emphasis supplied).

[11] Id. at 1344 (emphasis supplied).

[12] ABC, Inc. v. PrimeTime 24, 17 F. Supp. 2d 467 (M.D. N.C. 1998)(emphasis supplied).

[13] NPRM at ¶9.

the SHVA."[14] That responsibility, however, rests with Congress and the courts – the FCC simply lacks the authority to resolve this issue.

The agency states that it believes than "an expedited rulemaking is necessary to protect satellite subscribers who are *truly unserved* from losing network service."[15] The FCC has no evidence however, nor has it sought any information, concerning the number of people who might fall into that narrow category. On the contrary, the FCC acknowledges that most of the subscribers who are threatened with the loss of network service as a result of the Miami court's ruling are not qualified to receive such service as they do not live in "unserved households under any interpretation of that term."[16]

It is not surprising to find that the majority of satellite subscribers are not "unserved" -- in other words, the majority of these viewers receive a Grade B intensity signal at their homes. The Grade B intensity standard is recognized as an appropriate and reliable means of determining picture quality, and consequently, a local station's service area. Indeed, the FCC itself recently concluded that the existing NTSC Grade B service area should be the basis on which stations DTV coverage should be predicated. The FCC used this approach so as to "ensure that broadcasters have the ability to reach the audiences they now serve and *that viewers have access to the stations that they can now receive over the air*."[17] Thus, enforcement of the current Grade B standard in the SHVA

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[14] Id. at ¶15.

[15] Id.

[16] Id.

[17] Sixth Report and Order, In Re Advanced Television Stations and Their Impact Upon the Existing Television Broadcast Service, 12 FCC Rcd 14588, 14605(1997)(emphasis supplied).

will not result in the loss of network service to any cognizable number of viewers. Current satellite service subscribers, as well as future subscribers, will simply be watching network service over-the-air, through an antenna if necessary.

The agency states in this rulemaking that it seeks "to promote competition among multichannel video programming distributors, where that is possible under the SHVA."[18] What the agency fails to note, however, is that the SHVA was not intended to "promote competition" among MVPDs. The SHVA was created *solely* as a means of providing distant network signals to those few households who cannot receive local network signals. This is in sharp contrast to cable service, which is required by law to carry local signals. It is completely beyond the bounds of the FCC's jurisdiction to modify the SHVA from a copyright law into a competition statute.

Moreover, modifying the Grade B standard – at the expense of broadcasters' exclusive programming rights – to allow satellite providers to import distant network signals is not necessary to "promote competition" in the MVPD marketplace. In fact, the largest satellite provider, DirectTV, in a joint venture with Bell Atlantic, is marketing a new offering whereby it will install a new over-the-air antenna, along with the satellite dish, to its subscribers, to allow for "seamless" changing from local television stations to satellite services. This package provides satellite subscribers with the best of both worlds – access to the local news, sports, public affairs and entertainment programming of their local network broadcast stations along with access to the plethora of available satellite

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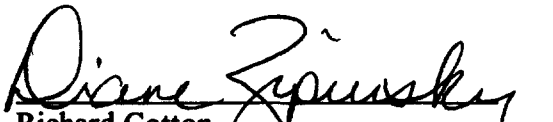
[18] NPRM at ¶15.

program services. This offering has been so successful in its initial launch that the companies intend to offer the package throughout the entire Bell Atlantic territory.

The most desirable long-term solution to the satellite companies desire to provide network signals as a means of increasing competition in the marketplace lies with Congress. NBC and other broadcasters have been encouraging lawmakers to revise the SHVA to permit local satellite retransmission of local network stations into their own local markets, provided these local stations grant retransmission consent. Such "local-to-local" legislation would make network signals available via satellite to all interested subscribers, while at the same time protecting the exclusive programming rights of broadcasters and the integrity and viability of the free over-the-air network distribution system. We encourage the Commission to support these efforts and to endorse an appropriate local-to-local regime.

Respectfully submitted,

NATIONAL BROADCASTING COMPANY, INC.



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